

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company :

Formula rate tariff and charges authorized : 11-0721

by Section 16-108.5 of the Public Utilities Act :

DISSENT BY

COMMISSIONER ERIN M. O'CONNELL-DIAZ

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Procedural History

On November 8, 2011 Commonwealth Edison Company ("ComEd") filed its performance-based formula rate tariff, Rate DSPP – Delivery Service Pricing and Performance ("Rate DSPP") pursuant to Section 16-108.5 of the Public Utilities Act, ("the Act") which the Illinois Commerce Commission suspended on the same day. (220 ILCS 5/16-108.5). The Commission issued a re-suspension Order on April 4, 2012. On May 29, 2012, the Commission issued a final Order in this docket. On June 22, 2012, the Commission granted Rehearing on three issues: the definition of the term "pension asset" in the statute cited above; the amount of interest to affix to reconciliation balances; and whether to use ComEd's year-end balance or an "average year," as it was defined in the May 29, 2012 Order, for purposes of reconciliations pursuant to the statute.

On October 3, 2012, the Commission issued an order on Rehearing, reducing ComEd's revenue by approximately \$133 million and approving new electricity rates through the end of 2012 to reflect the reduction, in accordance with a new performance-based formula rate plan. The Order on Rehearing was approved by the Commission by a vote of 4-1. This Dissenting Opinion reflects the analysis and conclusions of Commissioner Erin M. O'Connell-Diaz.

Statutory Mandates of the Energy Modernization Act

In this proceeding the Commission is charged with implementing a new statute, the Energy Modernization Act ("EIMA"), Illinois Public Act ("PA") 097-0616, as amended and supplemented by PA 097-0646). The Illinois legislature passed the EIMA with its stated goal of creating a comprehensive and integrated framework for

stimulating and supporting billions of dollars of new investment in infrastructure, building a twenty first century electric grid, technology with state of the art reliability, creating thousands of new jobs and expanding low-income assistance . EIMA holds participating utilities to new levels of financial and operational accountability. Pursuant to an annually updated and retrospectively reconciled formula rate, the EIMA also provides utilities the cost recovery they need to make the large investments envisioned by the statute. The components of the formula rate are set forth in specific detail and are intended to allow the utility to recover its actual prudent and reasonable costs of service.¹

Paramount to the proper implementation of this new statute is the Commission's obligation to follow the directives set forth by the General Assembly. Prior to the

passage of this historic legislation much debate ensued regarding the provisions of this new law. Indeed, the rate setting process put in place by EIMA is quite different from the traditional rate setting process known by the Commission. Although some aspects of traditional ratemaking under Article IX are still applicable, the input date, the formula rate itself, and the reconciliation practice specified in the Act do not fit into the traditional ratemaking paradigm. With that said, once the General Assembly passed the legislation and it became law the role of the Commission was clear-to implement the new law in accordance with its mandates. Indeed, the Commission as the administrative agency charged with this responsibility remains a creature of the legislature, having only such authority as the legislature deems to grant it. As such, the Commission may not

¹ Specifically, the General Assembly found that EIMA: (1) provides millions of dollars in customer assistance programs for low-income customers, senior citizens, active members of the armed services and reserved forces, and disabled veterans; (2) provides for infrastructure improvements designed to reduce outages due to storms; (3) requires improvement in a variety of performance metrics and imposes penalties on the electric utilities for failure to achieve the statutorily set goals; (4) provides cost savings and benefits to ComEd customers of full AMI deployment that are nearly 3 times greater than the cost to deploy AMI, and further that AMI deployment is estimated to result in a net savings to ComEd customers of \$2.8 billion over 20 years (as determined by an independent evaluation); and (5) confers substantial benefits upon the State's electric utility customers. PA 97-0646, Section 1.

substitute its judgment for that of the legislature. Yet, I would submit, that is what the Majority has done in this instance as well as in Docket 12-0001; Ameren Illinois Company's filing under the EIMA.

In the public utility sector Illinois has a long history of being on the forefront of innovation in its approaches to modernization and effective policy development regarding its regulatory jurisdiction. Appropriate and thoughtful legislative actions coupled with sound Commission decisions have allowed Illinois to be a leader in the development of competitive telecommunications markets and most recently in the electric and gas competitive markets. These actions have provided choice, savings and jobs to Illinois consumers. Energy efficiency; Renewable Portfolio Standards; Percentage of Income Payment Programs; Electric Vehicle Workshop Process and Illinois Smart Grid Working Group Initiative are but a few of the hallmarks of the active and forward looking endeavors that label Illinois as a leader in the national and international regulatory field. The EIMA is the most recent addition to this noteworthy list.

Juxtaposed to this is the Majority's decision in this case which, I most respectfully contend, will most assuredly result in a hobbled or even an abandoned deployment of the multi-pronged benefits envisioned by the General Assembly by its passage of EIMA. The three pillars of EIMA-utility investments, transparency coupled with accountability, and a stable regulatory environment through which only a utilities actual costs are fully recovered-are the result of months of legislative inquiry, debate and compromise. The success of EIMA –which is critical to the continued growth of the State's economy- requires the Commission to honor the balance of interests that the legislature has mandated in this landmark law. This legislation comes at a critical time for Illinois. Our economy as well as the nations has been hit hard by the recession. Incenting job growth through infrastructure build and fostering development of Illinois grown new technologies are components of the many value streams of EIMA. Energy infrastructure that was built for the last century requires modernization to ensure the safe, reliable and cost effective delivery of these essential services to Illinoisans. EIMA seeks to create the proper environment to accomplish these goals.

Of great importance regarding the Commission's decision here, is the reality that the formula rate tariff approved herein, will set the course of ratemaking in Illinois for years to come. That decision will have implications that extend far beyond the effect on

rates resulting from this particular case. Indeed, the success or failure of EIMA hinges on setting the formula correctly and in accordance with the law.

When interpreting a statute, the “cardinal rule of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intent of the legislature.” Collinsville Comm. Unit Sch. Dist. No. 10 v Regional Bd. of Sch. Trustees of St. Clair Cty., 218 Ill. 2d 175, 186 (2006). In this case, the EIMA contained specific language relating to the required inputs to the rate formula. At issue in this proceeding are the following provisions of the law:

1.Pension Asset- “investment return on pension assets net of deferred tax benefits equal to the utility’s long-term debt cost of capital as of the end of the applicable calendar year” 220 ILCS 5/16-108 (c) (4)(D);

2. Interest Rate-“The performance-based formula rate approved by the Commission shall ...provide for the recovery of the utility’s actual costs of delivery services”) id. 5/16-108.5 (c)... (“Charges for delivery services shall be cost based and shall allow the electric utility to recover the costs of providing delivery services.”)

3. Year End Rate Base for Annual Reconciliations-“The inputs to the performance-based formula rate for the applicable rate year shall be based on *final historic data reflected in the utility’s most recently filed annual FERC Form 1* plus projected plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the inputs are filed.” 220 ILCS 5/16.108.5 (d) (1).

As discussed further in this Dissent these various legislative provisions are prescriptive and set pursuant to the law passed by the General Assembly. It is, therefore, my position that the Commission’s Order on Rehearing entered on October 3, 2012 failed to properly implement EIMA in particular with regard to the above referenced rate formula issues. (See Commonwealth Edison Co., Order on Rehearing, Docket 11-0721 (October 3, 2012).

In response to the Majority’s Initial Order (See Commonwealth Edison Co. Final Order, Docket 11-0721 (May 29, 2012) the Illinois General Assembly- House of Representatives recognized the over-reaching and unauthorized stretch by the Commission into the statutorily set rate formula inputs and adopted HR 1157. (See Staff’s Reply Brief on Rehearing-Attachment A). This Resolution is expressly directed to certain findings in the Docket 11-0721 Final Order and the related interpretations of the EIMA. H.R. Res.1157, Amend. No.1, 97th Ill. Gen. Assem., Reg.Sess. (August 17,

2012). Pursuant to HR 1157, the House made clear its intended meaning of certain provisions of the EIMA and explicitly conveyed that contrary findings in the Docket 11-0721 Final Order “fail to reflect the intent of the General Assembly”Id.... Further the House reminded:

The Illinois Supreme and Appellate Courts have consistently held that public policy of Illinois is expressed by the General Assembly; it is not the province of an administrative agency to inquire into the wisdom and propriety of the legislature’s act or to substitute its own judgment for that of the legislature....

Id.

The House urged the Commission to “strongly consider” reversing the findings at issue and to “reach a decision that reflects the statutory directives and intent of the General Assembly.”

The General Assembly defines a resolution as an official “action, in the form of a formal legislative document, taken by the Senate alone, the House of Representatives alone, or both the Senate and House acting jointly...to express the opinion of one or both houses.” Illinois General Assembly, (Ill. Legislative Glossary). Unlike Staff suggests, both chambers of the General Assembly do not need to act on a resolution. On August 17, 2012, HR 1157 became an official act, “expressing the opinion” of the House of Representatives and thus a source of legal authority. Staff is correct when it asserts that the Commission may not rely solely on a legislative resolution in its determinations. (Staff Reply Brief at 42). The Commission must base its determinations on the law and the evidence of record in the case before it. The Commission can, however, utilize a resolution such as HB1157 as legal authority to assist in its understanding of the legislative intent of a particular statute. Given that a statute must be construed to effectuate the legislature’s intent such analyses are routinely relied upon. The Supreme Court has found “we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of [the statute at issue]...” North Haven Bd. of Edu.v. Bell, 456 U.S. 512, 530-35 (1982). This type of guidance regarding legislative intent is especially true in this matter involving new legislation such as EIMA.

Recent legal precedent also sheds light on the appropriate sources to refer in order to clarify or demonstrate legislative intent. The Illinois Supreme Court found the statements of just two Illinois Representatives in a House debate indicative of legislative intent. (Wisnasky-Bettorf v. Pierce, 965 N.E. 2d 1103, 1109 (Ill.2012). The Court has also considered a statement of a single Senator. ((Central Ill. Pub. Serv.Co. v Pollution Control Bd., 116 Ill.2d 397, 406 (1987). Moreover, the Supreme Court has also looked to a resolution, even those not passed by Congress, as evidence of legislative intent. Eldred v. Ashcroft, 537 U.S. 186, 227-230 (2003) (Stevens, J., dissenting). Further, the courts should use everything available to determine legislative intent: “[where] the mind labours to discover the design of the legislature, it seizes everything [sic] from which aid can be derived.”(Andrus v. Shell Oil Co., 446 U.S. 657, 666 (1980). Even pending legislation should be considered. (United States v. DeBonchamps, 278 F.2d 127,134 (9th Cir. 1960) (Jertberg, J., dissenting); (J. D. Robinson v. United States, 192 F. Supp. 253, 254 (N.D. Ga. 1961). Indeed, the Illinois Senate has introduced a similar resolution (S.R. Res. 821, 97th Ill. Gen. Assem., Reg. Sess. June 18, 2012). In accordance with the above cited cases, both of these resolutions serve to inform and clarify for the Commission the intent of the legislature regarding the EIMA.

More to the point, HR 1157 should have resolved any question the Commission or any party had relative to the Legislature’s mandate and proper interpretation of the rate formula inputs in the EIMA. A legislative resolution may inform questions of statutory interpretations and legislative intent, and is appropriately cited in support of legal arguments. (ComEd Petition for Approval of Initial Clean Air Act Compliance Plan, Order, Docket 93-0027, 1993 Ill. PUCLEXIS 233*15 (July 8, 1993). In pertinent part, HR 1157 stated the following regarding the three issues and gives guidance regarding the relevant legislative intent which is foundational to EIMA:

Pension Asset: WHEREAS, **No statutory authority was given to the Illinois**

Commerce Commission to deny recovery of a debt return on what

is commonly referred to as, what is reported in the Federal

Energy Regulatory Commission Form 1 (FERC Form 1) as, and what

the General Assembly regarded to be **a pension asset**; and;

Interest Rate: WHEREAS, the EIMA further provides in subsections (c) and (d) of Section 16-108.5...that those amounts to be credited or charged to customers following

the annual reconciliation process under the performance-based formula rate shall be "with interest"...**Such interest is intended to be set at the utility's weighted average cost of capital**, determined in accordance with the statute and;

Average Rate Base: WHEREAS, The EIMA also provides that the final year-end cost data filed in FERC Form 1 should generally be used to determine rates; and WHEREAS, **No statutory authority was given to the Illinois Commerce**

Commission to set rate base and capital structure using average numbers that do not represent final year-end values reflected in the FERC Form 1, and the Illinois Commerce Commission's use of such average is contrary to the statute. (emphasis added)

Amazingly, in its Order on Rehearing the Majority again ignores the record evidence, misinterprets and takes license with the statute, contravenes HR1157 and rejects the finding of the ALJs on the issues of interest rate and pension asset. Their determination leaps to the conclusion that "Given this limited statutory guidance, the General Assembly left it to the Commission to determine what constitutes an appropriate rate of interest." (Docket 11-0721 Order on Rehearing at 34). Such a rationale should be rejected as it belies the record and the provisions of EIMA that the Commission is charged to implement.

I maintain that the evidentiary record developed by the Commission's deliberate process is replete with support that the EIMA is clear in its mandate. If the Commission, however, finds it necessary in this case to consider legislative intent a legislative Resolution, such as HR1157 is the best evidence of that intent. The House of Representatives has told us via HR1157 what it intended relative to the above reference provisions of the EIMA. In applying legislation that it is charged to apply, the Commission must, in case of doubt about the meaning of a statute, use the intent of the General Assembly as its guiding principle. Harrison Tel. Co. v. Ill. Comm. Comm'n, 212 Ill. 2d 237, 247 (2004). Indeed, given that the Commission derives its power solely from the legislature and the EIMA is a case of first impression a Resolution regarding its intent relative to the new legislation is most telling and should be utilized to guide the Commission in its determinations.

It is well settled that setting utility rates is legislative rather than judicial function and although the Court defers to the Commission in setting utility rates the Court's

deference does not mean that the Commission may ignore pertinent factors affecting the rate making structure. (Citizens Utility Bd. v. Illinois Commerce Com'n., App. 1Dist. 1995, 213 Ill. Dec. 173, 276 Ill. App.3d 730, 658 N.E. 2d 1194, appeal denied, 214 Ill. Dec.857, 165 Ill. 2d 548, 662 N.E. 2d 423.) In this case, the Majority has chosen to substitute its judgment for that of the legislature to the detriment of the full realization of the EIMA.

To accept the Majority's interpretations on these core issues would require the Commission to believe that the General Assembly created a framework in which utilities would voluntarily accept substantial and unprecedented financial obligations, but would also subject them to cost recovery that, at least on these core issues, is significantly less favorable than under pre-existing law. It would, in short, require the Commission to accept the conclusion that the General Assembly purposefully withheld from the utilities who elect to participate in the EIMA model the very financial tools and resources needed to discharge their undertakings successfully and allow them to maintain their financial integrity. Such an absurd result is clearly not envisioned by EIMA.

It is from an understanding of this factual backdrop that the nature of the Majority's Order should be reviewed.

Pension Asset

While I concur with the ultimate conclusion of the Majority on the Pension Asset issue I do however, respectfully take exception to the language utilized in the concluding paragraph of that section of the Order on Rehearing. I submit that the Majority's verbiage is not reflective of the record and inappropriate supposition when they state as follows:

This is likely not the approach to pensions that the Commission would take on its own. As indicated above, in prior Article IX rate cases, the Commission only allowed for debt return on certain discretionary contributions. Indeed, the Commission remains concerned that this new approach could provide an opportunity for utilities to potentially engage in arbitrage—contributing more to

the pension to take advantage of Illinois ratepayer-provided rates of return that are significantly higher than other investment returns available in the open market. But this does appear to be the approach envisioned by the General Assembly when it passed EIMA, and so the Commission is bound to adopt it. In the ordinary course, the Commission is obligated to balance the interests of consumers with that of the utility and its shareholders. That being said, the Commission must still faithfully implement the law despite potential negative impacts. (Docket 11-0721 Order on Rehearing at 24).

As stated earlier, prior to the passage of this legislation drafts were debated, negotiated and deliberated. As with most legislative initiatives various interest groups may have been disappointed with the passage of certain parts or all of this legislation. Nevertheless, the General Assembly ultimately cast their votes and passed the EIMA. The Commission has the duty to discharge the directives provided to it by the General Assembly (220 ILCS 5/4-201), and has only those powers delegated to it by the General Assembly. (Bus. and Prof'l People for the Public Interest v. Ill. Comm. Comm'n, 146 Ill. 2d 175, 195 (1991)).

As such, it is inappropriate for the Commission to cast aspersions or intimate that the General Assembly has failed to balance the interests of the consumers, utility and its shareholders with this new statute. Additionally, I submit it is inappropriate to penalize a Company for funding the pensions of their employees. Moreover, there is nothing in the record in this matter to support the allegation by the Majority that “this new approach could provide an opportunity for utilities to potentially engage in arbitrage—contributing more to the pension to take advantage of Illinois ratepayer-provided rates of return.” As the Commission’s Orders are guided by the law and the record before it such an inflammatory supposition has no place in our deliberate process.

Interest Rate Reconciliation

Notably, in this Rehearing proceeding as well as Docket 12-001 the two sets of ALJs assigned to these matters both recommended use of the Weighted Average Cost of Capital (“WACC”) as the legally required interest rate input component for the formula rate under EIMA. I concur with both of those recommendations. The Majority, on the

other hand, rejected those sound recommendations and adopted its own version of the appropriate interest rate which in essence fails to compensate the utility for the time value of money in derogation of the law, the record, HB1157 and sound regulatory practice. Their determination leaps to the conclusion that “Given this limited statutory guidance, the General Assembly left it to the Commission to determine what constitutes an appropriate rate of interest.”(Docket 11-0721 Order on Rehearing at 34). Such a determination belies the record and the provisions of EIMA that the Commission is charged to implement and should be rejected.

I respectfully dissent to the Majority’s decision on this issue.

Section 16-108.5(d) (1) of the Public Utilities Act provides, in relevant part, as follows:

The inputs to the performance-based formula rate for

the applicable rate year shall be based on final historical data reflected in the utility's most recently filed annual FERC Form 1 plus projected plant additions and correspondingly updated depreciation reserve and expense for the calendar year in which the inputs are filed. The filing shall also include a reconciliation of the revenue requirement that was in effect for the prior rate year (as set by the cost inputs for the prior rate year) with the actual revenue requirement for the prior rate year (as reflected in the applicable FERC Form 1 that reports the actual costs for the prior rate year). Any over-collection or under-collection indicated by such reconciliation shall be reflected as a credit against, or recovered as an additional charge to, respectively, **with interest**, the charges for the applicable rate year. (emphasis added).

ComEd asserts the WACC is the only proposed interest rate that complies with the statute. Staff and Interveners argue a variety of methodologies based on short-term debt costs, modified WACC calculations, an adjusted version of the Commission’s “hybrid” approach in May 29th Order, and blends of these proposals based on whether the balance has been over- or under-collected.

The Order on Rehearing concludes that there is ambiguity in the EIMA in that the legislature simply noted that the balance would be recovered “with interest”. The Order

as entered concludes that WACC is not an appropriate interest rate as it has not traditionally been applied as such. In addition, the Order notes that these balances do not require permanent financing by ComEd. The Commission dismissed the approach recommended by Staff because Staff's proposal is premised upon ComEd financing balances with portions of long-term debt. The Commission in its Order on Rehearing also examined and dismissed the "blended rate" methodology that was approved in the Initial May 29th Order due to its inherent flaws. The proposal by AG/AARP was considered and then disregarded because AG/AARP's blended reconciliation rate relied upon longer term corporate bonds. The Majority ultimately adopted IIEC's proposal in its Order on Rehearing. IIEC's proposal allows for ComEd to carry its reconciliation balance with the cost of short-term debt.

Commissioner O'Connell-Diaz' Analysis

ComEd advocated use of its WACC for both under and over-recovered reconciliation balances and maintains that the WACC is the only proposed interest rate that complies with the statute. The Company also suggests that the AG, CUB, and Staff reach beyond the scope of this rehearing in asking the Commission to adjust the reconciliation amount to reflect certain tax calculations.

Staff proposes the interest rate be calculated using the same capital structure and embedded costs of debt as ComEd's overall WACC but adjusts the rate of return on common equity component to reflect the investment time horizon of the two-year delay between the rate year and the year in which the reconciliation balance is included in rates. For the rate of return on common equity component of the interest rate, Staff recommends replacing the 30-year U.S. Treasury yield with the two-year U.S. Treasury yield and multiplying the 580 basis point common equity risk premium by the ratio of yield spreads on the BAML index of 1-3 year investment grade corporate bonds to the BAML index of investment grade corporate bonds with remaining terms to maturity of 15 years or greater.

The Interveners generally agree that the WACC should not be applied to under and over-recoveries and also agree that no interest should be applied to the portion of the reconciliation balance that represents deferred taxes. AG/AARP recommend that the Commission approve a blended reconciliation rate that relies upon current interest

rates for newly issued debt that recognize the two-year delay in reconciling actual costs. Mr. Brosch proposed a blend of short- and long-term debt based on current market rates for corporate bonds and short-term non-financial commercial paper to produce an interest rate based upon current marginal costs of short/long term debt of 2.53%. CUB-City recommends that the Commission adopt the AG's recommended 2.53% for under-collected reconciliation balances, but maintain that the WACC is the appropriate interest rate to apply to over-recoveries. IIEC maintains that the WACC is inappropriate and that ComEd's short-term debt costs are a more accurate estimate of the carrying charge for the reconciliation balance. The Commercial Group argues that the reconciliation interest rate should not be set at the WACC but at either the hybrid rate the Commission adopted in the May 29 order or some other reasonable rate supported by the evidence in this proceeding.

Despite the disagreements, the general consensus amongst all of the parties is that the interest rate approved on reconciliation balance is intended to compensate for the utility for the time value of money. As recognized in the Commission's May 29th Order and as provided for by the statute, the formula rate established by the EIMA is intended to allow the utility to recover its full, actual costs it incurs in providing delivery services to customers. (see May 29 Order at 165; .220 ILCS 5/16-108.5(c)(1) ("The performance-based formula rate approved by the Commission shall provide for the recovery of the utility's actual costs of delivery services"); *id.* 5/16-108.5(c) ("charges for delivery services shall be cost based, and shall allow the electric utility to recover actual costs of providing delivery services.")). The reconciliation process is critical to achieving the statutory goal of actual cost recovery. Due to the fact that ComEd's actual costs during any rate year cannot be known until that year is over, the revenue requirement used to set the rates collected by ComEd during the rate year will necessarily differ from ComEd's actual revenue requirement during that year. Houtsma Reh.Dir., ComEd Ex. 32.0, 4:63-6:106; Pregozen Reh. Dir., Staff Ex. 25.0. 6:115-7:132.

Under the EIMA, timing of the utility's recovery of the costs for prudent plant investment is a critical factor to apply in this analysis. Under the time line of the EIMA, the utility will not begin to collect that reconciliation adjustment until two years after the costs are incurred. For example, ComEd's actual revenue requirement for 2015 will not be known until 2016, after the Commission has had the opportunity to review the prudence and reasonableness of new plant investments during 2015, and those amounts together with the 2015 carrying costs and depreciation on new investment will not begin to be recovered until 2017. Houtsma Reh. Dir., ComEd Ex. 32.0, 4:80-6:106. Because the utility's full recovery of its actual revenue requirement is delayed by two

years, the utility will not be made whole unless it is able to recover interest to compensate it for the delay in recovering its full, actual costs. See Hemphill Reh. Dir., ComEd Ex. 30.0, 6:109-123.

Pursuant to the construct of the legal regulatory time line under the EIMA reconciliation process, short term debt, as the Majority's Order prescribes, is by its very nature not an option of funding under these circumstances. The record and law in this matter reflects that the only interest rate that will make ComEd whole is the interest rate that the Company itself actually pays to finance the costs for which it has the delayed recovery occasioned by the reconciliation process under EIMA. That rate is the WACC. Given the extended period of time, (over two years) that funds are to be financed under the new law the interest rate input must represent the time value or more simply put the cost of those funds- which is WACC.

Some parties and the Majority maintain that ComEd will be able to finance under-recovery balances with short-term debt. This argument is based on the assumption that it is possible to trace capital from source to use. In the context of utility rate cases, this is an assumption that the Commission typically rejects because cash is fungible. From an economic perspective and regulatory reality I generally believe that cash is fungible and cannot be traced from source to use.

As stated earlier, I concur with the ALJs' Proposed Orders in this docket as well as that of Docket 12-001 finding that WACC is the proper interest rate for input under EIMA. (See Docket 11-0721 ALJs' Proposed Order, September 19, 2012; Docket 12-0001 ALJs' Proposed Order on Rehearing, September 19, 2012) In both cases, the ALJs conducted a proper analysis of the law and the record evidence regarding this issue. Based upon review of those Proposed Orders as well as the record herein I agree with their findings and recommendation. In particular, in the case of an under-recovery balance, it is not clear to the Commission that ComEd would or could rely exclusively on short-term debt, or debt, to fund the under-recovery. The Commission would not expect ComEd to totally change the way it manages its capital structure. Moreover, credit ratings are a key consideration in managing a utility's capital structure. Increasing the proportion of debt in the capital structure is not something the Commission would expect a utility to do without careful consideration. I concur with the ALJs' recommendation that the record does not support a finding that ComEd could or should finance reconciliation under-recoveries with only debt or short-term debt. The record supports a finding that reconciliation under-recoveries will likely be typical utility investments and expenses, some which may be capitalized, and will be financed with the utility's capital just like other investments and expenses. As for reconciliation over-

recoveries, I maintain that WACC is by definition ComEd's time value of money and that over-recoveries should not be treated any differently than under-recoveries.

Average or Year End Rate Base for Annual Reconciliations

The Majority adopted an average rate base as opposed to a year- end rate base. The Majority's Order stated that it believed that the language in EIMA left room for interpretation on this issue by the Commission. Specifically, the Order on Rehearing reads,

Section 16-108.5(c) (6) requires reconciliation of the revenue requirement "with what the revenue requirement would have been had the actual cost information for the applicable calendar year been available at the filing date." (220 ILCS 5/16-108.5(c) (6)). As Staff and the Interveners point out, not all plant additions are depreciated until they are actually in service. Additionally, depreciation of an asset cannot occur until the utility actually places that asset into service, which normally would be upon completion of a particular project. ComEd's proffered year-end balance for use in reconciliations does not depict this fact. An average rate base is more in conformance with the General Assembly's use of the term "actual cost information."

The Order goes on to assert that ComEd's belief that a year- end rate base must apply yields an "unjust or unreasonable" result because any activity that occurred in prior months is not properly considered (i.e.: adjustments to pro forma additions).

The Majority finally asserts in this Order that using an average rate base works to the benefit of both the Company and its shareholders and the ratepayer. They note, "... in light of the increasing plant expenditures each year, the legislature arguably created a system under which under-recoveries by the utility will be the norm."

Commissioner O'Connell-Diaz' Position

The new scenario that the EIMA contemplates is one that will involve a yearly "true up" of statutorily-defined expenditures and items and therefore it is not like a historical test year, in that, while it does concern what happened in the past, it continues

from year to year, in accordance with what Section 16-108.5 provides. The Commission will not see a “snapshot,” of what occurred in a particular year. This “true up” is not like a purchased gas or other type of traditional (e.g., coal tar clean-up) reconciliation, in that, it does not just concern a particular set of costs, for which, no rate of return, or, other items, such as depreciation, is allowed. Despite the difference between traditional reconciliation cases and the true-up involved with the new EIMA statute,, the General Assembly clearly envisioned a process where there would be a “running tabulation” regarding certain items from year-to-year, which bears some resemblance to established reconciliation cases. This was a case of first impression therefore it was critical at the outset that the Commission get the important rate input components mandated by the EIMA’s multi–year approach correct and I do not believe the Order as entered got these key components correct.

The General Assembly’s articulation of the purpose of these reconciliations as contained in the law is as follows:

Notwithstanding anything that may be to the contrary, the intent of the reconciliation is to ultimately reconcile the revenue requirement reflected in rates for each calendar year, beginning with the calendar year in which the utility files its performance-based formula rate tariff pursuant to subsection (c) of this Section, with what the revenue requirement would have been had the *actual cost information* for the applicable calendar year been available at the filing date. (220 ILCS 5/16-108.5(d) (1); emphasis added).

Of paramount significance is that the statute further provides in pertinent part:

The inputs to the performance-based formula rate for the applicable rate year shall be based on ***final historical data reflected in the utility's most recently filed annual FERC Form 1*** plus projected plant additions and correspondingly updated depreciation reserve and expense for the for the calendar year in which the inputs are filed. The filing shall also include a

reconciliation of the revenue requirement that was in effect for the prior rate year (as set by the cost inputs for the prior rate year) with the actual revenue requirement for the prior rate year (as reflected in the applicable FERC Form 1 that reports the actual costs for the prior rate year). Any over-collection or under-collection indicated by such reconciliation shall be reflected as a credit against, or recovered as an additional charge to, respectively, with interest, the charges for the applicable rate year.

220 ILCS 5/108.5(d) (1); emphasis added).

I note that the statute unambiguously requires that reconciliations are to be based upon “final historical ‘data.’” Final historical information in this context is information that is not only the most current; it is data as of the end of the entire period not merely the figures from the last month in the year. Investments are a cumulative item. An average rate base, by definition, does not and cannot properly reflect the final total investments for the year. The statute does not mention the term average nor does it direct a calculation to be performed to develop an average from the year end figure. In contrast, the final historical data reflected in ComEd’s most recent FERC Form 1 is the year end data, which does reflect the final tally of investments. The General Assembly’s decision not to use a derivation or the word “average” in Section 16-108.5(c)(6), especially when it did so elsewhere, (See 220 ILCS 5/16-108.5(c)(3)(A) precludes any party or the Commission for that matter to add such language into the Act. That is true as a matter of statutory construction in general. *E.g., Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (“where Congress includes particular language in one section of a statute but omits it in another ... it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-177 (1994). This axiom is particularly true in this situation where the Act is succinct regarding the Commission’s important but limited jurisdiction. “The Commission only has those powers given it by the legislature through the Act.” *Business and Professional People for the Public Interest v. Illinois Commerce Comm’n*, 136 Ill. 2d 192, 201, 555 N.E.2d 693, 697 (1989).

Moreover, due to the reality that the PUA is in derogation of common law, no requirement to be imposed on public utilities can be read into the Act by intendment or implication. *Turgeon v.24 Commonwealth Edison Co.*, 258 Ill. App. 3d 234, 251, 630

N.E.2d 1318, 1330 (2d Dist.), *appeal denied*, 157 Ill. 2d 524, 642 N.E.2d 1305 (1994). As such the “average” proposal championed by various parties is contrary to basic constitutional and statutory utility cost recovery principles. The “average” rate base methodology affords the utility recovery of only a portion of its total rate year investments. Once set in the formula rate there will never be a true up as the base number is incorrect in that it does not and can never represent the actual costs of the year’s investment. This result is untenable and illegal under the EIMA. Rates must reflect the cost of delivery services and must allow the utility to recover its costs of service *Citizens Util. Bd. v. Illinois Commerce Comm’n*, 166 Ill.2d, 111,121 (1995).

Additionally, Section 16-108.5(c) (6) requires reconciliation of the revenue requirement “with what the revenue requirement would have been had the actual cost information for the applicable calendar year been available at the filing date.” (See, 220 ILCS 5/16-108.5(c) (6)). As Staff and the Interveners correctly point out, not all plant additions are depreciated until they are actually in service. Accordingly, depreciation expense is recorded in the FERC Form 1 in a manner that reflects that new plant goes into service over the course of a year, and as such that is reflected as a depreciation expense for that year. Plant balances, however, are recorded in the FERC Form 1 as of the end of the year.

Given the clear and prescriptive language of Section 16-108.5(c) and (d) of the Act, as well as the expression of legislative intent provided to the Commission in HR 1157, H.R. Res. 1157, Amend. No. 1, 97th Ill. Gen. Assem., Reg. Sess. (Aug. 17, 2012), only the use of a year-end rate base or “final historical data” in the reconciliation revenue requirement is consistent with the provisions of the statute regarding the reconciliation. Courts and administrative bodies “must construe the statute as written and may not, under the guise of construction, supply omissions, remedy defects, annex new provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the language employed in the statute.” *County of Kankakee v. Illinois Pollution Control Bd.*, 396 Ill.App.3d 1000, 1027 (3rd Dist. 2009), *quoting In re County Treasurer and Ex–Officio Collector of Cook County*, 323 Ill.App.3d 1044, 1049 (1st Dist. 2001). That plain language has been reinforced by the clear statement of the Illinois House, confirming the legislative intent. Once known, as it is here, that legislative intent should resolve the debate.

For these reasons, I believe the Commission is compelled to follow the directive of the EIMA to use the final historical data reflected in the utility's most recently filed annual FERC Form 1.

Conclusion

As noted throughout this Dissent there are many factors to which I do not concur with the Majority in its Order for Rehearing entered on October 3, 2012. As it stands, the Majority's findings in the Order on Rehearing are contrary to and inconsistent with the substantial evidence of record; the express terms of the EIMA, and as a result are arbitrary and capricious. In its Order on Rehearing, the Majority, has for all intents and purposes effectively rewritten the terms of the EIMA. It is a main tenet of the Commission's role in public utility regulation that it must conform its actions to those granted to it by the law. It is clear to me that under Illinois law that the Commission remains a creature of statute, with the authority granted to it by the legislature. In those instances where the legislature has spoken, as is the instant case, the Commission may not substitute its judgment for that of the legislature.

While the Courts defer to the Commission in matters of setting utility rates, the Courts deference does not mean that the Commission may ignore pertinent factors affecting rate structure. In my view the well- developed record coupled with the application of the new constructs mandated by EIMA and clarified by HB1157 are such pertinent factors that the Majority failed to afford these factors appropriate consideration. This has resulted in a determination in this important case that takes a detour around the new law. The Commission's deliberate process that developed a robust evidentiary record as well as the legally established role of the Commission in the proper performance of its regulatory duties were overlooked. For these reasons cited herein, I am compelled to respectfully dissent from the Order on Rehearing entered by the Commission on October 3, 2012.